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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA
and TAPOCO, INC.,

Petitioners,

—v.—

UTILITIES COMMISSION OF THE STATE OF
NORTH CAROLINA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners Aluminum Company of America ("Alcoa") and Tapoco, Inc. ("Tapoco") submit this brief in reply to the brief which respondent North Carolina Utilities Commission ("NCUC") has submitted in opposition to their petition for a writ of certiorari.

1. The NCUC first argues that "[t]he abstention doctrine arose out of, and is particularly applicable to, utility rate proceedings." NCUC Brief at 5. The NCUC's statement is factually erroneous. Contrary to the NCUC's assertion, *none* of the cases in which this Court articulated the abstention

doctrine involved a state utility rate proceeding. See Petition at 15-18.[1]

More fundamentally, the NCUC fails to explain why a proceeding before a state utility commission is entitled to more deference from the federal courts than, for example, a proceeding before a state court. There is no precedential support for the NCUC's suggestion that the issue of abstention can be decided by looking only to the identity of the state agency or court whose actions are questioned in the federal court. Rather, as Alcoa and Tapoco demonstrated in their petition, the application of the abstention doctrine depends on a balancing of the competing state and federal interests in the subject matter which the state forum is attempting to regulate. Petition at 10-13.

In this case, petitioners allege that the NCUC's effort to give local North Carolina consumers "first call" on the inexpensive hydroelectric power which Tapoco generates in North Carolina and Tennessee interferes with important federal interests protected by the Commerce Clause and the preemptive Federal Power Act. As illustrated by the Eleventh Circuit's analysis in *Baggett v. Dept. of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983), the balancing of federal and state interests necessary to apply the abstention doctrine should have resulted in the retention of jurisdiction in a case such as this, because "[b]y its assertion of exclusive jurisdiction . . . the Congress has decreed, in effect, that no deference is due state proceedings which would entrench upon the exclusive federal do-

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1 The Court has had no occasion to consider whether the abstention doctrine should be applied in utility rate cases because Congress exercised its prerogative to delineate by statute (in the Johnson Act, 28 U.S.C. § 1342) the circumstances in which federal courts may, and may not, enjoin the enforcement of state ratemaking orders. The abstention issue arises in this case because the Court of Appeals ignored the policy judgment Congress made in the Johnson Act, and abstained even though, as the lower court recognized, the Johnson Act contemplates that the federal courts will enjoin the enforcement of state rate orders which burden interstate commerce or conflict with preemptive federal statutes. See p. 3, below.

main," while the state "has no interest in having her administrative agencies prosecute [proceedings] that the administrative agency has no jurisdiction to initiate." 717 F.2d at 524.

The *Burford* abstention doctrine, on which the NCUC and the court below principally rely, cannot properly be invoked to bar adjudication of the questions of *federal* law that Alcoa and Tapoco raise for the further reason that the *Burford* doctrine is intended only to avoid "[c]onflicts in the interpretation of *state* law" which might "result from the intervention of the lower federal courts." *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (emphasis supplied). See Petition at 13-14.[2]

The cases involving state administrative proceedings cited by the NCUC at pp. 7-8 of its brief have no relevance here, because in *none* of those cases (nor in *Burford* itself) did the plaintiff raise claims based on federal statutory preemption. Furthermore, all but two of these eight cases were dismissed on the ground that the Johnson Act, 28 U.S.C. § 1342, barred plaintiff's claims. As discussed in the petition at p. 16, this Court has held that the Johnson Act does not apply when a plaintiff alleges federal statutory preemption or interference with interstate commerce. *P.U.C. v. United Fuel Gas Co.*, 317 U.S. 456 (1943). The NCUC's argument that the federal courts should in all circumstances defer to state utility commissions in ratemaking cases quarrels with the basic policy decision Congress made when it enacted the Johnson Act, which prevents

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2 Because Alcoa and Tapoco allege that the NCUC's actions are violative of federal, rather than state, law, this case is not affected by the Court's recent holding that the Eleventh Amendment bars the federal courts from granting injunctive relief against state officials who are violating state laws. *See Pennhurst State School & Hosp. v. Halderman*, ___ U.S. ___, (Case No. 81-2101, January 23, 1984). In so construing the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), the Court was careful to point out that "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States'." Slip Op. at 14, *quoting Ex Parte Young*, 209 U.S. at 160.

the federal courts from interfering in garden variety rate cases but leaves them free to enjoin state ratemaking orders that burden interstate commerce or conflict with a preemptive federal regulatory scheme.

2a. In response to petitioners' argument that the Fourth Circuit's decision in this case conflicts with decisions of other circuits, the NCUC disputes petitioners' contention that the Second, Third, and Ninth Circuits have adopted a *per se* rule against invoking the abstention doctrine to bar claims based on federal statutory preemption.

The uncategorical statements of the decisions on which Alcoa and Tapoco rely speak for themselves. For example, in the *Brown* case which is now before this Court on the merits, the Third Circuit held that *Burford* abstention "has no application" in a preemption case, and that "no argument can be entertained based on disruption of a state administrative scheme in a case in which the court is asked to decide whether the very existence of that scheme violates a paramount federal statute." *Hotel & Res. Emp. & Bar. Int. Union 54 v. Danziger*, 709 F.2d 815, 832 (3rd Cir.), *probable jurisdiction noted, sub nom. Brown v. Hotel & Res. etc.*, ____ U.S. ____ (Case Nos. 83-498 and 83-573, Nov. 28, 1983). The Ninth Circuit has stated flatly that "[i]f a preemption claim is well founded, therefore, *Burford* abstention *cannot* be appropriate." *I.B.E.W. v. P.S.C.*, 614 F.2d 206, 212, n.1 (9th Cir. 1980) (emphasis supplied). *Accord, Knudsen Corp. v. Nevada State Dairy Comm.*, 676 F.2d 374, 377 (9th Cir. 1982) ("*Burford* abstention is particularly inappropriate when the plaintiff's claim is based on preemption, because abstaining under *Burford* would be an implicit ruling on the merits.") Similarly, the rule in the Second Circuit is that the abstention doctrine "is not appropriately invoked in a preemption case." *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 326, n. 2 (2d Cir. 1982), *aff'd*, 102 S.Ct. 3564 (1983). *Accord, Chemical Specialties Mfrs. Ass'n v. Lowery*, 452 F.2d 431 (2d Cir. 1971).

The NCUC's effort to establish that these three circuits have adopted a less than absolute rule against abstention in preemption cases relies on two decisions of the Third and Ninth Circuits which antedate the decisions on which petitioners rely. *Allegheny Airlines v. Pennsylvania Pub. Util. Com'n*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973); *California v. Oronville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969). These earlier cases do not support the NCUC's argument because they did not turn on the abstention doctrine but instead applied a different set of principles drawn from this Court's decision in *P.S.C. v. Wycoff Co.*, 344 U.S. 237 (1952).[3] In *Wycoff*, the Court held that a declaratory judgment action seeking to establish a federal defense to a threatened state administrative action, which had been brought *before* the state agency had actually entered its order, should be dismissed as premature. As the Fourth Circuit recognized in this case, the crucial factor in *Wycoff* was that in a declaratory judgment action, "the anticipation of a defense which arises under federal law does not establish federal jurisdiction," (9a) *quoting City Nat'l Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir. 1982). The court below went on to point out that *Wycoff* and its progeny have no application to a case such as this, because "plaintiffs seek to enjoin an already-issued NCUC order," and "[t]he federal courts, of course, often entertain suits to enjoin the enforcement of state orders which are alleged to have been preempted by federal statutes or to burden unduly interstate commerce." *Id.*

Thus, the two decisions applying *Wycoff* that the NCUC cites in its brief involved jurisdictional issues which are absent in the abstention cases, and those earlier decisions do not detract from the clarity with which the Third and Ninth

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3 The Ninth Circuit's decision in the *Oronville-Wyandotte* case did not even cite *Burford* or the other leading abstention cases. The Third Circuit's decision in *Allegheny Airlines* did discuss the abstention cases, as well as *Wycoff*, but the facts of the case clearly fit the *Wycoff* mold. See 465 F.2d at 243-44.

Circuits have now held that abstention is not appropriate in preemption cases.[4]

2b. Assuming *arguendo* that the NCUC were correct in its arguments that there is no conflict among the circuits and that the application of the abstention doctrine to preemption claims should be decided on a case-by-case basis, the Court should nonetheless grant the petition to address the second important question raised by Alcoa and Tapoco, which is whether the Fourth Circuit's decision established the correct legal standard for determining when, and in what circumstances, abstention is appropriate in preemption cases. Petition at 21-25. As Alcoa and Tapoco demonstrated in their petition, the Court of Appeals failed to employ the "balancing of interests" test that had previously been held to be necessary to apply the abstention doctrine, and the lower court instead adopted a test which made the decision to abstain turn on whether the federal court would be required to adjudicate a factual controversy before ruling on plaintiff's claims. This unprecedented approach would greatly expand the applicability of the abstention doctrine, and this Court should consider whether the Fourth Circuit's decision can be reconciled with the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Conservation District v. United States*, 424 U.S. 800, 817 (1976).

3. Finally, the NCUC argues that its orders do not in fact interfere with interstate commerce or conflict with the Federal Power Act because "the challenged Rate Orders merely set Nantahala's *intrastate* retail rates." NCUC Brief at 8 (emphasis in original). Of course, the merits of petitioners' preemp-

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4 The NCUC's brief implicitly criticizes Alcoa and Tapoco for refraining from seeking relief in the District Court until a panel of the NCUC, on remand from the North Carolina Supreme Court, had adopted an order which, for the first time, actually refused to give effect to the parties' federally regulated agreements. As the foregoing suggests, any earlier resort to the federal courts would undoubtedly have been met with a motion to dismiss based on *Wycoff*.

tion claims are not now before this Court; the Court of Appeals assumed those claims to be meritorious, but affirmed the dismissal of petitioners' complaint on the ground that the preemption claims could not be proved unless the District Court resolved disputed issues of fact. However, the NCUC's own order admits that the NCUC is attempting to give local customers "first call" on Tapoco's valuable hydroelectric power, (37a), and it would therefore seem beyond dispute that the NCUC has ignored this Court's admonition that "the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state customers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982). It is equally clear, from the NCUC's express rejection of Nantahala's proposed rate-making methodology because that method was "based in all material respects upon demand and energy entitlements as described in the [federally regulated] New Fontana Agreement and the Tapoco-Nantahala Apportionment Agreement," (37a), that the NCUC has refused to accept the FERC's exclusive and preemptive jurisdiction to regulate the parties' power supply arrangements under Part II of the Federal Power Act, 16 U.S.C. § 824 *et seq. F.P.C. v. Southern California Edison Co.*, 376 U.S. 205 (1964). The fact that the NCUC has chosen to mount these challenges to federal authority in a proceeding which is ostensibly concerned only with Nantahala's retail rates is of no consequence, because "[t]he federal regulatory scheme leaves no room either for direct state regulation of interstate [wholesale] transactions, or for state regulation which would indirectly achieve the same result." *Northern Natural Gas Co. v. State Corporation Com'n of Kansas*, 372 U.S. 84, 91 (1963) (citation omitted).[5]

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5 *Northern Natural Gas* was decided under the Natural Gas Act, but it is directly in point here because that Act and the Federal Power Act "are in all material respects substantially identical." *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, n. 7, (1961), *quoting F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

Respectfully submitted,

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